IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED

January 26, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	
	*	**C.C.A. No. 03C01-9902-CR-00084**
Appellee,	*	
	*	**HANCOCK COUNTY**
vs.	*	
	*	**Hon. James E. Beckner, Judge**
BALLARD EUGENE ANDERSON,	*	
	*	**(Reckless Homicide)**
Appellant.	*	

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OPINION FILED: _____

CONVICTION AFFIRMED; SENTENCE MODIFIED

David G. Hayes, Judge

OPINION

_____The appellant, Ballard Eugene Anderson, appeals his conviction by a Hancock County jury for the offense of reckless homicide, a class D felony. The trial court imposed the maximum sentence of four years incarceration in the Department of Correction. On appeal, the appellant challenges the sufficiency of the evidence, the imposition of the maximum sentence, and the denial of an alternative sentence.

After review, we affirm the conviction but modify the sentence to reflect a two year sentence of supervised probation.

BACKGROUND

The facts of this case leading to the shooting death of the victim are not in dispute. The appellant and his wife lived in a rural area of Hancock County near the Clinch River. On February 17, 1998, the two had invited Jeff McKinney and his girlfriend, Pam Hickman, to their home. That afternoon as the appellant was processing deer meat for their dinner, Mike Rimer, Bobby Joe Cupp and Robert Owens appeared at the appellant's home. Although the appearance of the three men was unexpected, they were nevertheless invited to remain for dinner. Cupp lived in the area and the appellant was acquainted with all three men. Prior to their arrival, the three had spent the afternoon drinking beer and smoking marijuana. Rimer, who liked to consume two "tall boys" at a time, had already drunk at least six beers. After their arrival, the threesome continued to drink beer from a full cooler they had brought along. During the meal with all guests present, Rimer became belligerent and called Ms. Hickman a "whore" and a "bitch." He then accused McKinney and Ms. Hickman of stealing his father's chainsaw. Both Ms. Hickman and McKinney were fearful of Rimer as he had previously assaulted McKinney and had attempted to rape Ms. Hickman.

The appellant told Rimer to either calm down or he would have to leave. When Ms. Hickman finished her meal, she arose from the table and Rimer got in her face and cursed her again. The appellant repeated his warning to Rimer but Rimer

persisted in the confrontation, pushing Ms. Hickman with his chest. In her defense, the appellant placed a hand on Rimer's shoulder and ordered him to stop. Rimer struck the appellant with his fist and the two men wrestled to the floor in the kitchen. During the fracas in which both the appellant and Rimer exchanged blows, the appellant was struck on the eye on which he had recently had surgery. The appellant was able to escape the grasp of Rimer but not before Rimer had pulled a large clump of his hair out. The appellant retreated to the bedroom, retrieved his 30-30 rifle and loaded a shell into the chamber. Undaunted, Rimer charged into the bedroom after the appellant.

Again, the appellant urged Rimer to leave and told him that because of their friendship he did not want to shoot him. Rimer placed the gun's barrel to his chest and told the appellant to shoot him. Then, the appellant stepped back and Rimer swung at him. Fending off Rimer, the appellant, using the stock of the gun, struck Rimer in the forehead, breaking the stock. Further incensed, Rimer began swinging madly; the appellant hit Rimer with the gun barrel followed by another blow to the head with the stock.

The appellant ran into the other bedroom to get his .270 rifle which he found unloaded. Following closely behind, Rimer charged again and his body met with the 30-30 rifle barrel which was still in the grasp of the appellant. The appellant maneuvered beside him out the bedroom door, through the living room, and onto the front porch. Rimer pursued the appellant to the front door but would not step outside. A brief interlude occurred and the appellant, assuming that the fight was over, went back inside. As the appellant reentered his home, Rimer, who was standing near the front door, knocked the appellant toward the stove. The distance between the front door and the stove is sixteen and one-half feet. At this point, the appellant, who was standing near the stove, fired the fatal shot. Rimer took a few steps backward and fell toward the door. The appellant instructed the others to call the police. Shortly thereafter, the officers arrived and found the victim's body in the living room in front of the doorway.

At the beginning of the affray, McKinney ran from the house and remained outside on the ridge. During the encounter, Cupp and Owens repeatedly demanded

that Rimer break-off his attack which was ignored by Rimer. At the time of the shooting, Cupp had started the vehicle, hoping to diffuse Rimer and get him to leave. Owens had followed Cupp outside but remained on the porch. Mrs. Anderson and Ms. Hickman remained inside.

At trial, the factual dispute focused on the location of the appellant and the victim at the time of the shooting. The appellant testified that the victim was shot as the two struggled for the weapon; that the appellant grabbed the gun; that he "yanked" backward and it went off. Ms. Hickman's statement to the investigators indicated that the two men were three to four feet apart when the fatal shot was fired. The appellant's wife testified that both men were pulling on the gun when "it went off." Owens, who viewed the shooting from the front porch, testified that Rimer grabbed the barrel of the gun and was only three feet away when the gun was fired. Dr. McCormick, a forensic pathologist, characterized the fatal wound as a "distant" gunshot wound. In defining this term, he explained; "So how far is distance? It could be four or five feet. It could have been fifty feet . . . I can't answer from the wound . . . In other words, this gun wasn't right up against this man's belly." Dan Royse, a TBI forensic scientist testified that, based upon his testing of the weapon, the weapon was fired from a distance of five feet or more from the victim.

The proof at trial also established that the victim had a blood alcohol level of .211 percent and tested positive for marijuana in addition to having marijuana on his person. The appellant's drug and alcohol tests were both negative. Based upon this proof, the appellant was convicted of reckless homicide.

I. SUFFICIENCY OF THE EVIDENCE

The appellant contends that the evidence is insufficient to support his conviction of reckless homicide. It is the appellant's position that the proof only "established that the defendant was conforming to established law," the law of self-defense under the "true man" doctrine of State v. Renner, 912 S.W.2d 701 (Tenn. 1995) (holding no duty to retreat from attack when defendant did not provoke confrontation, was lawfully in a place where confrontation occurred, and was placed in reasonably apparent danger of imminent bodily harm or death). See also Tenn. Code Ann. § 39-11-611. The State concedes that the victim was the initial

aggressor and the appellant was under no duty to retreat. However, the State maintains on appeal that the appellant's actions were inconsistent with self-defense in that the appellant used excessive force on an unarmed victim when the appellant had successfully fended off the appellant without the need of deadly force.

The appellant's sufficiency argument centers upon the jury's rejection of his claim of self-defense. This focus is misplaced as the issue of self-defense is a question of fact for the jury. See State v. Arterburn, 391 S.W.2d 648, 653 (Tenn. 1965); State v. Ivy, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993). Additionally, our supreme court in Renner, 912 S.W.2d at 704, provided that application of the "true man" doctrine is also with the province of the jury. The court stated,

> The jury determines not only whether a confrontation has occurred, but also decides which person was the aggressor. It also decides whether a defendant's belief in imminent danger was reasonable, and whether the defendant was without fault. Thus, a defendant may expect only that the jury be properly instructed regarding the law of self-defense (including the "true man" doctrine), thereby enabling the jury to correctly apply the law to the facts as it finds them.

Id.

The appropriate inquiry for this court on appeal is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e); Tenn. R. Crim. P. 29(a). In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

In order for the State to convict for reckless homicide, it must establish (1) that the defendant killed the victim and (2) that the defendant acted recklessly. Tenn. Crim. App. § 39-13-215 (1997).

> "Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-106(a)(31).

The risk of which the accused is aware must be substantial in order for the recklessness judgment to be made. The risk must also be unjustifiable. The awareness of the risk is measured from the actor's point of view. The question remains as to what standard is used in determining how substantial and how unjustifiable the risk must be in order to warrant a finding of culpability. These are questions to which the jury must evaluate the actor's conduct and determine whether it should be condemned. Thus, the jury must answer two questions: (1) to what extent was the actor aware of the risk, of factors relating to its substantiality, and of factors relating to its unjustifiableness; and (2) whether the actor's conscious disregard of the risk justifies condemnation. See Comment, MODEL PENAL CODE §§ 2.02 and 210.2 (4) (1985). See e.g., State v. Dean Benjamin Clark, II, No. 02C01-9705-CC-00186 (Tenn. Crim. App. at Jackson, May 8, 1998).

It is uncontroverted that the appellant shot and killed the victim. Viewing the evidence in the light most favorable to the State, the experts all agreed that the lack of evidence establishing the presence of nitrate residue, powder, or soot on any of the victim's clothing all indicated a "distant gunshot wound." The experts also agreed that the weapon was fired from a distance of five feet or more from the victim. These factors are sufficient for a rational trier of fact to conclude that the appellant was aware that the firing of a weapon in close proximity of another individual during a volatile confrontation was likely to cause injury to that individual. Since the discharge of a 30-30 caliber weapon is likely to result in injury, the risk created is substantial. Accordingly, we find from our review of the record that a rational juror could reasonably conclude that the appellant's actions constituted a gross deviation from the standard of care required of a reasonable person in the same circumstances. For these reasons, we find the evidence sufficient to support the appellant's conviction for reckless homicide.

II. SENTENCING

The appellant contends that the trial court erred by imposing the maximum sentence. He argues that the trial court: (1) improperly applied enhancement and mitigating factors thereby imposing an excessive sentence and (2) improperly denied an alternative sentence or probation.

This court's review of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1997). See also State v. Bingham, 910 S.W.2d 448 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). This presumption is only applicable if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on the appellant to show that the sentence imposed was improper. Id.; State v. Fletcher, 805 S.W.2d 785, 786 (Tenn. Crim. App. 1991); Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d). The record reflects that the trial court considered the relevant principles of sentencing; accordingly, the presumption is afforded.

At the sentencing hearing, the State relied upon the evidence presented at trial and the presentence report. The appellant presented three witnesses including two former employers. The proof established that the fifty year old appellant is a brick layer by trade and was promoted to foreman over a crew. The employers attested to the appellant's stellar work habits. All the witnesses had been present in the appellant's home and had never witnessed any violent nature of the appellant. Moreover, the witnesses noted that the appellant was a person of sobriety. The State presented no proof to the contrary.

The trial court found two enhancement factors applied: (1) prior history of criminal convictions and (9) possession of a firearm in the commission of the offense. See Tenn. Code Ann. § 40-35-114. The court applied mitigating factor (2) that the defendant acted under strong provocation. See Tenn. Code Ann. § 40-35-113. After weighing the enhancement and mitigating factors, the trial court imposed the maximum sentence of four years for the Class D felony.

A. Enhancement Factors

Initially, we note that we are unable to review the trial court's application of enhancement factor (1), concerning the appellant's previous history of criminal convictions or criminal behavior, as the appellant's presentence report has not been included in the record. In conducting our *de novo* review, we are required to consider the contents of the presentence report. See Tenn. Code Ann. § 40-35-

210(b)(2). It is the appellant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues that are the bases of appeal, including evidence considered by the trial court in setting a sentence. See Tenn. R. App. P. 24(b). "In the absence of an adequate record on appeal, this court must [conclusively] presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App.1991); State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App.1993). Therefore, we must presume that the trial judge's assessment of the appellant's criminal history is accurate.

At the sentencing hearing, the prosecutor noted that presentence report reflected that the National Crime Information Center (NCIC) report indicated that the appellant had no criminal history. However, the State had previously obtained an NCIC report on the appellant indicating prior criminal convictions from Maryland. In order to verify the convictions were the appellant's, the State sent the fingerprints of the appellant to the FBI to be matched to those of the defendant in those crimes in Maryland. Although the FBI verified that the convictions were the appellant's through his fingerprints by sending a letter and a report, the State attested that the Department of Correction in Maryland had purged their records of these convictions because the convictions were thirty years previously. The State then moved for the presentence report to be amended to reflect the prior convictions and the FBI letter and identification report to be made part of the presentence report.[1]

Again, the record before us is incomplete for failure to include the presentence report or the FBI identification report and letter for our review. Therefore, we conclude that the appellant has waived any argument related therefrom. However, the State asserted at the hearing that the appellant had five convictions in 1968 for petty larceny, four counts breaking and entering in 1969, and an assault and beating in 1969. Without addressing the appellant's arguments, we conclude, that even if the trial court properly considered the thirty year old

[1]The NCIC report and FBI letter and report concerning the appellant's Maryland convictions supplied the only proof of the convictions. Although reliable hearsay is admissible in sentencing hearings, Tenn. Code Ann. § 40-35-209(b), the Tennessee Supreme Court has described NCIC reports as "pure hearsay, of a dubious degree of accuracy, prepared for purposes other than court use, and containing information that is likely to be prejudicial under all circumstances and is not the best evidence of matters that can be proven by reliable, documentary evidence." State v. Buck, 670 S.W.2d 600, 607 (Tenn. 1984). In this case, the appellant does not question the accuracy of these convictions, only their introduction as evidence.

convictions from Maryland in support of enhancement factor (1), that this factor is entitled to very little weight in view of the age of the convictions and the absence of any criminal history from that point forward.

Finally, with regard to enhancement factors, the appellant does not contest the court's application of factor (9), use of a firearm. The trial court found this enhancement factor "very significant [and given] very weighty consideration."

B. Mitigating Factors

Again, we note that the trial court applied mitigating factor (2) that "[t]he defendant acted under strong provocation" and we agree with its application. The appellant contends the trial court should have applied the following mitigating factors: (3) "[s]ubstantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;" (11) [t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct;" and (13) "any other factor" in that the appellant exhibited great remorse over the death of his friend. Tenn. Code Ann. § 40-35-113.[2]

In declining to apply mitigating factor (3), the trial court found that the facts do not support this mitigator. We conclude otherwise. The record demonstrates that the victim was repeatedly asked to leave the appellant's home and refused to do so. The victim, who was the aggressor, was belligerent; highly intoxicated; drugged; and after the altercation had ceased on at least four occasions, continuously provoked the attack. Presumably a man's home is his castle and no man should be required to flee his home or abandon his wife to avoid the assaults of an intruder. Thus, we would apply this mitigating factor.

With reference to mitigating factor (11), i.e., that it is unlikely that a sustained intent to violate the law motivated the appellant's conduct, the trial

[2]The trial court failed to state on the record its findings regarding the application of Tenn. Code Ann. § 40-35-113(13), remorse. We are unable to apply this mitigating factor based upon our review of the cold record. Because we are unable to view the appellant's demeanor or gauge his sincerity, the trial court is in a better position than this court to determine the appellant's remorse.

court rejected this factor based in part upon the circumstances of heavy drinking and smoking marijuana because "[the appellant] created the situation by letting it occur there." The record does not support this conclusion. The record does establish that the appellant's drug and alcohol tests were both negative. The State offered no proof of the appellant's use of alcohol or drugs; in fact, the proof is to the contrary. Moreover, the only evidence of marijuana stemmed from the uninvited visitors at the appellant's home. No evidence was introduced that anyone was smoking marijuana while at the appellant's home. The record establishes that the appellant's conduct was motivated by his desire to remove the victim from this home, not from a "sustained intent to violate the law." Accordingly, we find mitigating factor (11) applicable.

In sum, we conclude that two enhancement factors apply and three mitigating factors apply. As a Range I offender convicted of a Class D felony, the sentencing range is two to four years. Tenn. Code Ann. § 40-35-112(a)(4). The presumptive sentence for Class D felonies is the minimum in the range; however, when both enhancement and mitigating factors are present, the court begins with the minimum and enhances within the range as appropriate for the enhancement factors and reduces the sentence appropriately for mitigating factors. Tenn. Code Ann. § 40-35-210(c) and (e). We conclude that the mitigating factors significantly outweigh the enhancement factors and modify the appellant's sentence to the minimum sentence of two years.

C. Alternative Sentence

Finally, the appellant argues that he should have received an alternative sentence or probation. The trial court entered the following findings:

> Alternative sentencing usually is not available to those people that by their criminal conduct have killed another person. Probation is usually not available to those persons who by their conduct have killed another person. In fact, by law there's a greater burden. The burden is on the defendant to show entitlement under those circumstances. . . . [I]n this case the circumstances are that there was a drinking party in which alcohol was being consumed in large quantities and marijuana had been smoked and that once the match was lit and the keg exploded, a gun was introduced, a firearm[3]. . . . The circumstances of the offense speak against

[3]We have previously addressed the issue of the appellant's lack of participation in the use of alcohol and marijuana on the date of the offense. See supra at 10. We briefly note that the appellant's introduction of a gun occurred within the confines of his home, protected by state and

probation.

Additionally, the trial court cited deterrence as a reason for denying an alternative sentence.

Because the appellant was convicted as a standard offender of a Class D felony, he is entitled to the presumption of an alternative sentence. See State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993); Tenn. Code Ann. § 40-35-102(5) and (6). We find the trial court's pronouncement that "[a]lternative sentencing usually is not available to those people that by their criminal conduct have killed another person" incorrect. Beginning with Ashby in 1991 and continuing to date, the appellate courts of this state have repeatedly held that "[o]nce the legislature has specifically authorized the use of sentencing alternatives to confinement for a particular offense, trial courts may not summarily impose a different standard by which probation is denied solely because of the defendant's guilt for that offense." Bingham, 910 S.W.2d at 454 (quoting State v.Hartley, 818 S.W.2d 370, 374 (Tenn. Crim. App. 1991)). The legislature has declared reckless homicide, which necessarily includes a death, a Class D felony. To apply a different standard because a death is involved violates the mandates of our Sentencing Act. Id. at 454-455.

The statutory presumption of an alternative sentence may be rebutted by "evidence to the contrary." See Tenn. Code Ann. § 40-35-102(6). Sentences involving confinement should be based on the statutory sentencing considerations of Tenn. Code Ann. § 103(1)(A),(B), or (C). We find that neither 103(1)(A) nor (C) are applicable to the present case. The trial court denied an alternative sentence based upon the seriousness of the offense. See Tenn. Code Ann. § 40-35-103(B). In order to deny an alternative sentence based on the seriousness of the offense, "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or

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federal constitutions. U.S. Const. amend. II; Tenn. Const. art. 1, § 26. It was only the manner of its use, however, which was unlawful. We believe that the appellant's possession of the gun or guns in his home may readily be distinguished from the person who unlawfully carries a weapon in a non-constitutionally protected place for the purpose of going armed or to facilitate the commission of a crime.

otherwise of an excessive or exaggerated degree," and the nature of the offense must outweigh all factors favoring a sentence other than confinement. Bingham, 910 S.W.2d at 454 (quoting Hartley, 818 S.W.2d at 374-75). In this case, while the results were indeed tragic, we are unable to conclude that the circumstances of the offense meet the standards approved in Hartley.

The trial court also denied an alternative sentence based on deterrence. Before a trial court can deny alternative sentencing on the ground of deterrence, there must be some evidence contained in the record that the sentence imposed will have a deterrent effect within the jurisdiction. Bonestel, 871 S.W.2d at 169 (quoting State v. Horne, 612 S.W.2d 186, 187 (Tenn. Crim. App.1980)). The finding that there will be a deterrent effect within the jurisdiction cannot be merely conclusory but must be supported by proof. See Ashby, 823 S.W.2d at 170. The court's statement alone is insufficient to supply this basis for a deterrent effect. Therefore, deterrence cannot be the basis to establish "evidence to the contrary" in this case. For the above reasons, we conclude that the State has failed to rebut the appellant's statutory entitlement to an alternative sentence.

D. Probation

There is no bright line rule for determining when probation should be granted. To meet the burden of establishing suitability for full probation, the defendant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App.1990). Each sentencing decision necessarily involves a case-by-case analysis from the facts and circumstances presented.

Applying the above factors to the present case, we conclude that the appellant has potential for rehabilitation as evidenced through his approximately thirty years of being a law-abiding and productive citizen. As previously stated, we cannot conclude in this case that probation should be denied based upon the circumstances of the offense nor that a grant of probation would fail to deter others committing a similar crime. Upon our *de novo* review, we conclude that the appellant met his burden of establishing suitability for supervised probation and that probation would both serve the ends of justice and fulfill the

rehabilitative needs of the appellant.

Accordingly, the judgment of conviction is modified as follows: The appellant's sentence is reduced to two years supervised probation. This case is remanded for entry of a judgment consistent with this opinion.

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DAVID G. HAYES, Judge

CONCUR:

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ALAN E. GLENN, Judge

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JOE H. WALKER, III, Special Judge